



RUTH WILLINGHAM
CLERK OF THE COURT

Court of Appeals

STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX ARIZONA 85007

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April 12, 2012

1:00 **FILED**
O'Clock p.M.

APR 16 2012

SANDRA K MARKHAM, Clerk
By: [Signature]

Sandra K Markham, Clerk
Yavapai County Superior Court
Yavapai County Courthouse
120 S Cortez St No 300
Prescott AZ 86301-3868

Dear Ms. Markham:

RE: 1 CA-SA 12-0032

DEMOCKER v. HON DONAHOE/STATE
Yavapai County Superior Court
P1300CR201001325

The following are enclosed in the above entitled and numbered cause:

Original MANDATE
Copy of DECISION ORDER

There are no records to be returned

RUTH WILLINGHAM, CLERK

By [Signature]
Deputy Clerk

Enclosures (as noted)
cc (letter only):
Gregory T Parzych
Steven A Young
Jeffrey G Paupore
Hon Gary E Donahoe, Retired Judge
David L Mackey

IN THE
Court of Appeals
STATE OF ARIZONA
DIVISION ONE

STEVEN CARROLL DEMOCKER,) Court of Appeals
) Division One
Petitioner,) No. 1 CA-SA 12-0032
)
v.) Yavapai County
) Superior Court
THE HONORABLE GARY E. DONAHOE,) No. P1300CR201001325
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of YAVAPAI,)
)
Respondent Judge,)
)
STATE OF ARIZONA, ex rel.,)
SHEILA SULLIVAN POLK, Yavapai)
County Attorney,)
)
Real Parties in Interest.)
)

MANDATE

TO: The Yavapai County Superior Court and the Honorable Gary E Donahoe, Commissioner, David L Mackey, Judge, in relation to Cause No. P1300CR201001325.

This cause was brought before Division One of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its DECISION ORDER and it was filed on March 6, 2012.

The time for the filing of a motion for reconsideration has expired and no motion was filed. The time for the filing of a petition for review has expired and no such petition was filed.


NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the DECISION ORDER of this court; a copy of which is attached hereto.

I, Ruth A. Willingham, Clerk of the Court of Appeals, Division One, hereby certify the attachment to be a full and accurate copy of the DECISION ORDER filed in this cause on March 6, 2012.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Arizona Court of Appeals, Division One, on April 12, 2012.

(SEAL)

RUTH WILLINGHAM, CLERK

By  Deputy Clerk

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

COURT OF APPEALS DIVISION ONE
STATE OF ARIZONA
FILED

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RUTH WILLINGHAM, CLERK
BY [Signature]

STEVEN CARROLL DEMOCKER,)	
)	No. 1 CA-SA 12-0032
Petitioner,)	
)	DEPARTMENT B
v.)	
)	
THE HONORABLE GARY E. DONAHOE,)	Yavapai County
Judge of the SUPERIOR COURT OF THE)	Superior Court
STATE OF ARIZONA, in and for the)	No. P1300CR201001325
County of YAVAPAI,)	
)	DECISION ORDER
Respondent Judge,)	
)	
STATE OF ARIZONA, ex rel., SHEILA)	
SULLIVAN POLK, Yavapai County)	
Attorney,)	
)	
Real Party in Interest.)	
)	

The Court, Presiding Judge Diane M. Johnsen and Judges Donn Kessler and Patricia A. Orozco, participating, has considered the petition for special action, the response and the reply.

The petition for special action challenges the denial by the respondent superior court of petitioner's request for an evidentiary hearing on his Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office. For the reasons set forth below,

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No. P1300CR201001325

IT IS ORDERED accepting jurisdiction of the petition for special action and granting relief.

When, as here, the superior court has denied a motion to dismiss or to disqualify the prosecutor based on alleged prosecutorial misconduct, the order is not subject to immediate appeal. Although the order may be reviewed on an appeal from a judgment of conviction, given the anticipated length and expense of the pending retrial, in the exercise of our discretion we conclude that petitioner lacks an adequate remedy from the superior court's ruling. *See generally Turbin v. Superior Court*, 165 Ariz. 195, 797 P.2d 734 (App. 1990).

The Clerk of the Court's report, along with Judge Mackey's comprehensive order dated March 16, 2011, established that unfortunate mistakes in the Clerk's electronic storage of case documents allowed Yavapai County Attorney's Office personnel to view and print documents that were filed ex parte and/or sealed by order of the court. The Clerk's report established that County Attorney's Office personnel viewed and/or printed the

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documents even though the documents plainly were designated "ex parte" and/or "sealed."¹

In its response to the petition, the State does not dispute or attempt to excuse the acts detailed in the report of the Clerk of the Court and Judge Mackey's order.² Rather, citing *State v. Pecard*, 196 Ariz. 371, 377, ¶¶ 28-29, 998 P.2d 453, 459

¹ Pursuant to Rule 4.4(b) of the Arizona Rules of Professional Conduct, "A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." See *Chamberlain Group, Inc. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D. Ill. 2010) (lawyer's duty to disclose receipt of privileged document under this rule applies even when documents are received outside normal discovery process). The record in this case does not reveal one way or the other whether members of the County Attorney's Office notified the court or the defense that they had received sealed or ex parte documents.

² Certain orders issued under seal by the superior court bore endorsements indicating the court was transmitting them to the prosecution as well as to the defense. At a hearing on petitioner's motion to dismiss/disqualify, the superior court asked the prosecutor and petitioner's counsel if they had noticed the endorsements, and both said they were unaware of them. In this special action, the State suggests that petitioner is not entitled to relief because he knew all along that these orders were being sent to the County Attorney's Office. The State offers no authority for its implicit assertions that petitioner is estopped or that he has waived relief, or that the court personnel's mistakes somehow authorized the prosecution to download, read and print other documents submitted or filed under seal.

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(App. 2000), the State argues the superior court properly denied petitioner's motion because petitioner failed to show he was prejudiced by the prosecution's acts. But *Pecard* does not support the State's contention that, under circumstances such as those here, petitioner was required to offer evidence with his motion that the prosecution's acts prejudiced his defense. To the contrary, our supreme court has held that when the prosecution "invades the attorney-client relationship and interferes with a defendant's right to counsel the state has the burden to demonstrate that no evidence introduced at trial was tainted by the invasion." *State v. Warner*, 150 Ariz. 123, 128, 722 P.2d 291, 296 (1986). In *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004), the court explained:

The defendant bears the initial burden to establish an interference in the attorney-client relationship. Once he does so, the state bears the burden of demonstrating that the defendant was not prejudiced by the interference and must convince the court beyond a reasonable doubt that the defendant received a fair trial.

Id. at 448, ¶ 77, 94 P.3d at 1143.

Petitioner's motion, along with the Clerk's report and the March 16, 2011, order, establish that members of the County Attorney's Office interfered with petitioner's relationship with

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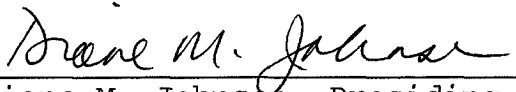
his counsel by viewing and/or printing sealed documents and other documents petitioner's counsel filed ex parte and under seal. Therefore, pursuant to *Warner* and *Moody*, we reverse the order denying petitioner's motion. As in *Warner*, we "remand for a hearing to determine how, if at all, defendant was prejudiced by the state's intrusion, with the burden on the state to prove" that petitioner has not been prejudiced. 150 Ariz. at 128, 722 P.2d at 296. In considering the issue of prejudice and whether and what remedy to grant petitioner, the superior court may consider and make findings with respect to the prosecution's motive in viewing and printing the confidential documents, any use the prosecution made of the documents, whether the prosecution's interference with petitioner's right to counsel was deliberate, whether the State "benefited in any way" from the prosecution's unauthorized acts and, of course, "whether defendant was, in fact, prejudiced." *Id.* at 129, 722 P.2d at 297.

The superior court may exercise its discretion to establish any prehearing disclosure or discovery procedures it deems appropriate. By this order, we do not mean to require the superior court to take further evidence with respect to facts

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established by the report of the Clerk of the Court and/or Judge Mackey's order. Rather, as in *Warner*, the hearing on remand shall be directed to facts relevant to the court's consideration of the appropriate remedy, if any, required by the acts detailed in the report and Judge Mackey's order.



Diane M. Johnsen, Presiding Judge